Filed 10/2/02 Alexander v. City of Compton CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GALEN ALEXANDER, Plaintiff and Appellant, v. CITY OF COMPTON et al., Defendants and Respondents.	B153560 (Los Angeles County Super. Ct. No. TC012803)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rose Hom, Judge. Affirmed.

Law Offices of Steven Dobbs and Steven Dobbs for Plaintiff and Appellant.

Legrand H. Clegg II, City Attorney, and Cal P. Saunders, Deputy City Attorney for Defendants and Respondents.

****

Appellant Galen Alexander appeals the entry of summary judgment in favor of his former employer and three individuals he sued in connection with the termination of his employment. We affirm.

STANDARD OF REVIEW

On appeal from an order granting summary judgment, we independently examine the record to determine the existence of triable issues of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) Respondents prevailed in their motion for summary judgment below; accordingly, we review the record de novo to determine whether they have "conclusively negated a necessary element of the plaintiff's case, or . . . demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial . . . ." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We perform this function by viewing the evidence in a light favorable to Alexander, "liberally construing [his] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in [Alexander's] favor."[1] (*Saelzler*, at p. 768.)

FACTUAL AND PROCEDURAL BACKGROUND

Alexander was hired by the City of Compton as a park maintenance employee in May 1989. He continued to work in that capacity until his termination in February 1999. Throughout his employment with the City, Alexander was classified as a civil service employee.

---

[1] As discussed below, Alexander made no evidentiary showing in his opposition to the motion for summary judgment. The failure to provide evidence in support of his claims is fatal to Alexander's appeal. (See *Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 355; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625.)

Alexander sought review of his termination, and was granted a hearing before the City of Compton Personnel Board. At the hearing, Alexander testified and his representative called witnesses and presented arguments to the board.

On February 23, 2000 Alexander filed a claim for damages against the City, alleging he was unlawfully terminated and was denied due process of law. He claimed $2 million in damages.

In the meantime, the personnel board voted to affirm Alexander's termination based upon the evidence presented at the hearing. Alexander's representative received notice of the personnel board's decision upholding Alexander's termination on March 3, 2000, and informed Alexander the same day.

Alexander filed his complaint in the instant action on July 10, 2000, alleging causes of action for wrongful termination and interference with contractual relations. Alexander named as defendants in the action the City and three individuals: "Tony McKenzie," Blitta Shipman and Keith Dickerson.[2]

Respondents asserted 10 affirmative defenses in their answer to the complaint, including one that Alexander's action was barred on the ground that he had failed to comply with Code of Civil Procedure[3] sections 1094.5 and 1094.6, and he thus had failed to exhaust his "judicial remedies." In another affirmative defense, respondents asserted that "[t]he findings of the Compton Personnel Board upholding [Alexander's] termination as proper is binding upon [Alexander] because of his failure to seek judicial review of the administrative determination within ninety days of notice of the finding Via a Petition for Writ of Administrative Mandate."

Discovery proceeded, and on June 19, 2001 respondents filed a motion for summary judgment. In support of the motion, along with a separate statement of

---

[2] The complaint also refers to "Sotelo" as a defendant, without further identification.

[3] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

undisputed material facts, respondents submitted declarations, excerpts of Alexander's deposition, and documentary evidence, including the notice of intent to terminate and the termination notice, Alexander's claim for damages against the City, and the personnel board's decision upholding Alexander's termination. Alexander opposed the motion, but did not dispute any of respondents' undisputed facts or counter respondents' evidentiary submissions with any evidence of his own.

The trial court granted respondents' motion, finding no disputed issue of material fact in light of the fact that Alexander's only opposing affidavit was that of his attorney who merely argued that respondents' defense should have been asserted sooner. The court further noted that Alexander had failed to address respondents' other arguments raised in the motion.

This appeal followed.

DISCUSSION

In his appeal from entry of summary judgment against him, Alexander argues, as he did below, that there is a triable issue of fact as to "whether there was a waiver of 'petition for writ of review' by the respondents' conduct." Specifically, Alexander contends that respondents are estopped from asserting a defense based on Alexander's failure to file a petition for writ of review of the personnel board decision because discovery had proceeded in the action and respondents should have raised the issue sooner.[4] Alexander's argument is frivolous.

In opposing respondents' motion for summary judgment, Alexander sought to rely on his attorney's *argument*, set forth in a declaration, that respondents had waived

---

[4] Alexander's opening brief on appeal is virtually identical to his opposition to the summary judgment motion. Indeed, it appears that the only change Alexander made when he went from opposing the summary judgment to appealing it was his attorney.

or were otherwise estopped from asserting a complete defense to the action because they had not discussed it with Alexander's counsel during the course of discovery. But Alexander was required to "present evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "'Once the defendant . . . has met [his burden of showing that a cause of action has no merit], the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' (Code Civ. Proc., § 437c, subd. (o)(2).)" (*Id*. at p. 849.)

Alexander failed to meet this burden, and the trial court's grant of summary judgment against him was proper.

The trial court's determination was correct as a matter of law as well. A city employee seeking judicial review of a decision to terminate his or her employment is limited to administrative mandamus review under section 1094.5. (*McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785.) "Judicial review of most public agency decisions is obtained by a proceeding for a writ of ordinary or administrative mandate. (Code Civ. Proc., §§ 1085, 1094.5.) . . . Usually, quasi-legislative acts are reviewed by ordinary mandate and quasi-judicial acts are reviewed by administrative mandate. [Citation.]" (*Id*. at p. 1785.)

The appropriate standard for such review was articulated by the Supreme Court in *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212: "A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."

Under section 1094.6, a petition for writ of mandate must be "filed not later than the 90th day following the date on which the decision becomes final."

The undisputed facts in this case are that Alexander, a civil service employee for the City of Compton, was terminated from his employment following issuance of a notice of intent to terminate and a notice of termination. He appealed his termination to the City of Compton Personnel Board, and he was afforded a hearing before that body at which he testified and his representative called witnesses and presented arguments. Following that hearing, the personnel board found that he had been properly terminated. Alexander was notified of the board's decision on March 3, 2000. But instead of filing a petition for writ of mandate within 90 days of notification of the board's action, Alexander instituted a lawsuit against the City and three individuals.

In his opposition to the summary judgment motion, as on appeal, Alexander asserted that respondents waived the requirement that Alexander seek review of the personnel board's determination by administrative mandate by proceeding with discovery in the action. He cited no authority for this proposition. On appeal, he further contends that respondents are estopped from asserting "the defense of the 'Statute of Limitations' as their defense because of their conduct after their answer, which induced the appellant to continue with the case." He concludes, "In the instant case, the respondents' conduct deprived the appellant of his claim."

None of the cases Alexander cites in support of his claim has any application to the instant case, and Alexander's reliance on them is misplaced. In *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 396, the court held that in an action to compel a public official to do his duty after the statutory period has passed, a complying official may be bound by a noncomplying official's waiver of the statute of limitation. There is no suggestion in this case that an official failed to perform a duty or that there was any waiver of an applicable statute of limitations. Hence, *Lerner* is inapposite.

In *Iusi v. City Title Ins. Co.* (1963) 213 Cal.App.2d 582, the court rejected appellant's assertion that defendant was estopped to assert the applicable statute of limitations. The court observed, "estoppel to plead the statute of limitations arises as a result of some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action. There are roughly three classes of cases in which estoppel has been applied: (1) Where the plaintiff is aware of his cause of action and the identity of the wrongdoer, but the latter by affirmative acts induces the plaintiff to refrain from suit; (2) Where the plaintiff is unaware of his cause of action, and his ignorance is due to false representations by the defendant; (3) Where the plaintiff is unaware of the identity of the wrongdoer and this is due to fraudulent concealment by the defendant. (1 Witkin, California Procedure, Actions, § 170 et seq., p. 681.)" (*Id.* at p. 589.) As in that case, Alexander's case "is devoid of the misrepresentation and reliance elements requisite to an application of estoppel rules." (*Ibid*.)

Finally, in *Carruth v. Fritch* (1950) 36 Cal.2d 426, 433, the court held, "'One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.'" But Alexander does not so much as hint at any application of this rule to the facts of the instant case.

Given the undisputed facts and Alexander's failure to cite any relevant authority in support of his waiver and estoppel arguments, the trial court correctly determined that the instant action is barred based on Alexander's failure to file a petition for writ of mandate, within 90 days of the board's decision or otherwise.

DISPOSITION

The summary judgment in favor of the City of Compton is affirmed. Appellant is ordered to bear respondents' costs of appeal.

NOT FOR PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, P.J.

BOREN

_____, J.

NOTT